

[Waiver 1996-6]

**MEMORANDUM**

TO: Charles W. Thompson, Jr.  
County Attorney

FROM: Laurie B. Horvitz, Chair [initialed]  
Montgomery County Ethics Commission

RE: Request for Waiver—Appointment of Outside Counsel

DATE: July 9, 1996

The Ethics Commission has received your memorandum, dated June 18, 1996, in which you request a waiver of Section 411 of the Montgomery County Charter. Your request involves the appointment of Arent, Fox, Kitner, Plotkin & Kahn (“Arent, Fox”) to represent the County in a consumer protection matter.

Your memorandum explains that the Office of the County Attorney placed ads in The Journal and The Daily Record in April of 1996 seeking law firms capable of handling a major consumer affairs case for the County. Six law firms submitted proposals. A panel was created to evaluate the proposals. The panel included a representative from the Office of Consumer Affairs, two attorneys from private practice, and two attorneys from the County Attorney’s Office. Arent, Fox was selected because of the firm’s expertise and proposed fee arrangement. Arent Fox includes an attorney, Mr. Alan Malasky, who possesses extensive trial experience and considerable expertise in consumer protection law. Mr. Malasky will be performing and directing the legal services for the County. The law firm will represent the County on a contingency fee basis.

A waiver of Section 411 is necessary in this case because Arent, Fox also represents clients who may be involved in litigation against the County or who may possess interests that are adverse to the County. Section 411 provides in part:

No person whose compensation is paid in whole or part by the County shall (1) act as an attorney . . . or receive compensation or anything of value from any person, firm or corporation transacting business of any kind with, or engaging in litigation against the County, or any instrumentality thereof; (2) represent or serve any client in any manner if that client’s interest is adverse to that of the County . . . .

Arent, Fox has identified six categories of legal representation that may each require a waiver of Section 411. The law firm wishes to represent: (1) clients who have or are seeking approval of industrial revenue bonds approved by the County or the Housing Opportunities Commission; (2) IDI Companies, an entity that has obtained a loan from the County in connection with the development of the Ambassador Hotel project for low-moderate income housing; (3) clients who seek a waiver of the County’s right of first refusal to purchase multi-unit rental facilities or a waiver of the County’s moderately priced dwelling unit requirements; (4) clients involved in real estate transactions who are

seeking the appropriate level of transfer tax that should be imposed on the transaction by the Department of Finance; (5) clients who are seeking County approval through the issuance of a permit, license, special exception, variance, or zoning change so long as the County is not a party opponent; and (6) clients before quasi-judicial bodies so long as the County has not been in that matter a party opponent before that body.

Section 19A-8(a) of the Montgomery County Ethics Code defines the appropriate waiver standard. A waiver may be granted when the Ethics Commission finds that:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee an unfair advantage over other members of the public.

At its last meeting, the Ethics Commission decided to issue a waiver to permit the appointment of Arent, Fox. The Commission found that the best interests of the County would be served by granting the waiver. Arent, Fox was selected pursuant to a competitive process. A panel of public and private individuals chose Arent, Fox over five other applicants. In the view of the County Attorney, Arent, Fox would provide the best legal representation to the County in this matter. In addition, the County evaluated the proposed fee arrangement and determined that it was acceptable. In light of these facts, the best interests of the County would be served by granting the waiver.

The Commission also found that the importance to the County of hiring Arent, Fox outweighs the actual or potential harm of any conflict of interest. Significantly, none of the law firm's six potential conflicts involves consumer protection matters. Furthermore, many of the requested areas of representation do not require Arent, Fox to represent interests that are truly adverse to the County. To further minimize the potential of any conflict, the Commission is imposing two restrictions on the law firm. First, the attorneys at Arent, Fox who will be providing legal representation to the County in the consumer protection case may not participate in the law firm's representation of clients in transfer tax matters (item 4 above). Second, Arent, Fox may only represent clients before the following quasi-judicial bodies of the County: the Board of Appeals, the Hearing Examiner, the District Council, the Historic Preservation Commission, and the Sign Review Board. An additional waiver would be required in order to represent clients before other quasi-judicial bodies.

Third, the Commission found that the granting of the waiver would not give Arent, Fox an unfair advantage over other members of the public.

In light of these facts and considerations, the Commission granted the waiver request. Please let the Commission know if you need any additional guidance.

cc: Alan R. Malasky, Esquire  
Arent, Fox, Kitner, Plotkin & Kahn